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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 THE AMERICAN SOCIETY OF MEDIA
4 PHOTOGRAPHERS, INC., et als.,

Plaintiffs,

v.

10 CV 2977 (DC)

6 GOOGLE, INC.,

7 Defendant.

8 -----x

9 New York, N.Y.
10 September 12, 2013
10:03 a.m.

11 Before:

12 HON. DENNY CHIN,

13 Sitting by Designation

14 APPEARANCES

15 MISHCON de REYA NEW YORK LLP
Attorneys for Plaintiffs

16 MARK BERUBE
17 DAN MANDELL

18 DURIE TANGRI
Attorneys for Defendant
19 JOSEPH C. GRATZ

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1 (In open court)

2 THE COURT: Good morning. We're here on a discovery
3 issue. We're on the record so that I can make some rulings if
4 need be. I have letters from plaintiffs' counsel dated August
5 15 and August 22nd; I have a letter from defense counsel dated
6 August 21; and then I have defense counsel's letter dated
7 August 29th transmitting this 312-page document listing
8 apparently thousands and thousands of entries.

9 I think I read somewhere recently that the Southern
10 District rules have changed -- I'm not on the e-mail list
11 anymore-- regarding the filing of letters. I'm not sure, but I
12 only raise the question to the extent anyone wants to preserve
13 this for appeal, you're going to have to have these letters
14 docketed. So I don't know if the rules changed, but if you
15 want them docketed, the alternative way to do it is just to do
16 a stip, attach them, submit it for me to be so ordered, and
17 then it can be made a part of the official court record.

18 I'll hear first from plaintiff's counsel.

19 MR. BERUBE: Good morning, your Honor. May it please
20 the Court.

21 THE COURT: Good morning.

22 MR. BERUBE: First, Jim McGuire, my partner,
23 apologizes for not being here today. He was actually married
24 this past Saturday and he's on his honeymoon right now.

25 THE COURT: Tell him I said congratulations.

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1 MR. BERUBE: Thank you.

2 Your Honor, we're seeking leave to move to compel
3 disclosure of communications between Google and its
4 litigation --

5 THE COURT: Yes. I think you don't need -- we'll
6 treat this as a motion for now and if I think I want a full
7 briefing or if the parties want a full briefing, you can let me
8 know. But for now I just want to hear on the merits.

9 My question for you is-- well, first, what documents
10 are we talking about and then why do you need them?

11 MR. BERUBE: We're talking about the documents I think
12 that are listed in this log that Google has produced to the
13 Court. Google has made a blanket assertion that any and all
14 communications between it and its litigation adversaries are
15 protected from disclosure under the common interests
16 privilege.

17 THE COURT: I don't think that's quite what they're
18 saying. They're not saying everything. They're saying
19 communications relating to the settlement discussions. And so
20 it's not everything.

21 MR. BERUBE: It's my understanding, your Honor, that
22 this log that was produced to the Court is the log of the
23 settlement communications. We have much --

24 THE COURT: That might be, but what you said was --
25 don't overstate. What you said was that they're withholding

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1 all communications between counsel. I don't think that's what
2 they are saying. They are saying that certain communications
3 reflect settlement discussions and that they are withholding
4 those pursuant to Rule 408.

5 Is that correct?

6 MR. BERUBE: I don't believe it's --

7 THE COURT: Mr. Gratz?

8 MR. GRATZ: Yes, your Honor. And I don't know whether
9 there's a difference between what Mr. Berube has in his mind
10 and what I have in mind, but what is on this log are
11 settlement communications during the period when the
12 settlement was being negotiated and during which approval was
13 being sought.

14 THE COURT: There were quite a few, I'm sure.

15 MR. GRATZ: Yes.

16 THE COURT: So that's all we're talking about in this
17 312-page privilege log. These are all settlement-related
18 communications.

19 MR. GRATZ: Yes, your Honor.

20 THE COURT: Okay. Next. Go ahead.

21 MR. BERUBE: That's correct, your Honor. I didn't
22 mean to dispute that in any way.

23 THE COURT: Okay.

24 MR. BERUBE: But Google does make an argument based
25 upon relevance and Rule 408. The principal argument was, on

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1 the privilege log, that these documents are all privileged and
2 they're privileged for two different reasons: One, Google
3 maintains there's an underlying privilege of documents, that
4 they're protected by the attorney-client privilege, work
5 product protection; and then there's the common interest
6 privilege which prevents waiver of the underlying privilege
7 from exchanging the communication or document with their
8 adversary.

9 So, again, there is an underlying privilege that's
10 being asserted here on the log and then there is a common
11 interest doctrine that they're relying on to say that there's
12 been no waiver of that underlying privilege. There is no
13 relevance objection anywhere included on this log. The log
14 entirely deals with privilege objections.

15 THE COURT: Well, I think the question is how are
16 these-- how are these settlement communications relevant or how
17 can they lead to relevant evidence?

18 MR. BERUBE: Okay.

19 THE COURT: What's the answer to that?

20 MR. BERUBE: Number one, they're relevant because
21 they're on the log, your Honor.

22 THE COURT: They're not relevant because they're on
23 the log. They might be responsive. I mean, you probably-- I
24 don't know what the request is. The request probably is for
25 any and all communications between counsel relating to

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1 settlement. These are responsive. It doesn't mean they agree
2 they are relevant.

3 Just why do you need these documents? That's my
4 question.

5 MR. BERUBE: I need the documents because, as listed
6 on the log, your Honor, they're dealing with copyright
7 intellectual property issues. The description given of these
8 documents on the log-- and this is, for example, your Honor, on
9 page 14 of the log --

10 THE COURT: Will these documents help you prove any
11 facts at trial? Will they lead to any evidence that would be
12 admissible at trial?

13 MR. BERUBE: If Google's views are its fair use
14 defense are included in those communications that were
15 exchanged between it and its adversary, that is clearly
16 relevant to my case. I will be able to use those views to
17 develop further evidence --

18 THE COURT: And if those discussions arise in the
19 context of an effort to settle, how do they become admissible?
20 I mean, in other words, they are trying to settle.

21 MR. BERUBE: Rule 4 --

22 THE COURT: They are discussing compromise. It falls
23 within Rule 408.

24 MR. BERUBE: Rule 408, your Honor, only prevents the
25 admissibility at trial, number one. The admission at trial of

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1 communications, settlement communications, used to either
2 establish liability or damages. It doesn't even relate to
3 discovery. That's number one.

4 THE COURT: I understand that. And I just said a
5 moment ago it's not-- well, first, are they admissible at
6 trial, or will they lead to admissible evidence even assuming
7 they are not? So how would these documents lead to admissible
8 evidence?

9 MR. BERUBE: My contention is, your Honor, if they
10 have documents being disclosed on a privilege log that
11 directly relate to intellectual property issues and copyright
12 issues, those communications could lead me to relevant
13 information.

14 THE COURT: So your response is they are relevant
15 because they are on the log?

16 MR. GRATZ: No, they're relevant even the way they
17 describe them on the log.

18 THE COURT: That's what you just said. If that were
19 the rule, why would anyone put it on a log? Go ahead. What
20 else?

21 MR. BERUBE: Well, there is a case we cite to your
22 Honor from the Southern District saying exactly that; that
23 because the party put the documents on the privilege log, they
24 impliedly agree they are relevant documents. There's a case
25 directly on point for that proposition, your Honor, that we

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1 cite to you.

2 THE COURT: Well, I don't know what the case says.
3 What I am saying to you is merely because something is listed
4 on a log does not mean that it is relevant or admissible or
5 that it will lead to admissible evidence. All that it means is
6 that it is responsive. And so I'm not sure what the original
7 request was, but if the request was any and all communications
8 between counsel relating to settlement, then they should be
9 listing everything even assuming it's not relevant. There's a
10 difference between relevance and responsiveness.

11 How did you phrase the request?

12 MR. BERUBE: The request, your Honor is-- if I could
13 hand this up.

14 THE COURT: Yes.

15 MR. BERUBE: Most of this was done through electronic
16 discovery, your Honor.

17 THE COURT: Okay. You can hand it up. Hand it to my
18 law clerk.

19 MR. BERUBE: That's where Google maintains the
20 majority of its documents. And we negotiated a search term --

21 MR. GRATZ: Could I have a copy?

22 THE COURT: You gave me both.

23 MR. BERUBE: I'm sorry, I apologize.

24 MR. GRATZ: Thank you.

25 MR. BERUBE: We negotiated a search term, your Honor,

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1 that's set forth as search term number three, directly designed
2 to pull all communications related to the Authors Guild
3 litigation, the companion litigation to this case. We
4 negotiated the search term to pull those documents.

5 Google agreed --

6 THE COURT: That doesn't mean that they are relevant
7 or admissible or will lead to admissible evidence. They relate
8 to it, but --

9 MR. BERUBE: In the context --

10 THE COURT: I mean, parties are trying to negotiate a
11 settlement. They are going back and forth. The essence of it
12 is to try to compromise. There's a reason why the rules say
13 that such communications generally are not admissible. I think
14 to the extent you want to get at other things, there may be
15 other documents that give you the same thing without
16 implicating settlement discussions. I really am not hearing
17 any good reason to produce these things.

18 MR. BERUBE: The one issue you wanted me to address,
19 your Honor, I think was the scope of the request. That is the
20 scope of the request that the parties agreed upon. There was
21 not a relevance objection made to the production of those
22 documents, your Honor. That was an agreed-upon negotiated
23 settlement term.

24 I've included an e-mail from opposing counsel
25 stating that they will produce all documents related to the

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1 Google --

2 THE COURT: That's another thing that troubles me.
3 Just because they're trying to compromise, you turn it into an
4 admission, and that's not right. That's not right. I mean,
5 they were trying to compromise. I don't know why you didn't
6 just take them up on the compromise. It doesn't mean that they
7 say you are right. They're trying to avoid coming into court
8 so that we take time going over these things. And you're
9 reading too much into it, Counsel.

10 MR. BERUBE: That e-mail, your Honor, dealt with the
11 negotiation of the search terms which both parties compromised
12 on. That was not related to this particular issue, your Honor.
13 That was negotiated--

14 THE COURT: I've heard enough.

15 MR. BERUBE: Okay.

16 THE COURT: The motion is denied. I am not going to
17 compel this production. If you want to make a motion for
18 reconsideration and submit a brief, feel free to, but I'm
19 really not hearing anything that is at all persuasive. If you
20 want to make a motion for reconsideration, go ahead. Do it
21 within whatever the time frame is. Google need not respond
22 unless I ask for a response.

23 Okay. Anything else we should discuss while you're
24 here?

25 MR. BERUBE: The only other outstanding discovery

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1 issue between the parties right now, your Honor, is the
2 depositions of Mr. Larry Page and Sergey Brin. We had raised
3 this issue a while ago with the Court. I think the Court's
4 response was if we could demonstrate a good cause for their
5 depositions, we could depose them. We've sent a letter to
6 Mr. Gratz on that issue. Mr. Gratz informs me he will be
7 getting back to me at the end of the week with their position
8 on that.

9 I just wanted to let the Court know that there could
10 be another letter coming, but not today. I don't have anything
11 to raise today.

12 THE COURT: That's fine. That's fine. Let me ask you
13 this. You know, I'm having argument on the summary judgment
14 motion in the other case on the 23rd. This case is trailing,
15 and my question is you're doing a lot of work, in part because
16 I've been pushing you to get it done. But what impact will my
17 decision on the summary judgment motion in the other case have
18 on this case? I don't know what's going to happen. Are we
19 better off waiting until you see what I do, or what?

20 MR. BERUBE: It's certainly our view that if you found
21 the program not to be fair use, that would be a substantial
22 impact on our case. If you found it to be fair use, though, I
23 think our case is substantially different from the Authors
24 Guild case such that it would not have a major impact on our
25 case. I think the fair use issues relative to the photographs

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1 and illustrations are substantially different from fair use
2 issues regarding the entire book, your Honor.

3 THE COURT: So either way you're going to press this,
4 I gather.

5 MR. BERUBE: Yes, your Honor.

6 THE COURT: Okay. I don't remember the date. I have
7 it written down here somewhere. What is your discovery cutoff?

8 MR. BERUBE: The fact discovery cutoff has already
9 passed. The remaining discovery to be taken at this point
10 would be the depositions of Mr. Page and Mr. Brin.

11 THE COURT: That's still fact discovery but it's been
12 carved out, I gather, from the deadline?

13 MR. BERUBE: That's correct, your Honor. Possibly
14 some third-party discovery, which has also been carved out, and
15 then we're going to be engaging in expert discovery right now,
16 that's where we are, on the fair use and liability issues.

17 THE COURT: All right. Mr. Gratz, do you want to add
18 anything?

19 MR. GRATZ: No, your Honor.

20 THE COURT: Okay. All right. Well, anything else
21 then?

22 MR. BERUBE: No, your Honor. Thank you.

23 THE COURT: If you need my assistance on any of these
24 other remaining discovery items, do the same thing. Write a
25 letter. The other side shall respond. And if I feel like I

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1 need briefing, I would ask for it. I might see you in the
2 first instance. We'll see.

3 MR. BERUBE: Thank you, your Honor.

4 THE COURT: Okay. Thank you.

5 MR. GRATZ: Thank you, your Honor.

6 (Adjourned)